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In The

Supreme Court of the United States

October Term, 1997

JOSEPH W. TEAGUE and HELEN B. TEAGUE, STEVEN ALLEN BARKER, RITA STRAHOWSKI, SWANNEE BECK and KAREN PEREZ TUCKER, Lifetime Partners of PTL, As Representatives of a Nationwide Class consisting of 150,290 PTL Lifetime Partners and of 27,839 Persons Who Partially Paid for Lifetime Partnerships,
Petitioners,

vs.

JAMES O. BAKKER, DAVID A. TAGGART and AIMEE CORTESE,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

NELSON S. CASSTEVENS, JR.
CASSTEVENS, HANNER, GUNTER & CONRAD
602 East Morehead Street
P.O. Box 34607
Charlotte, NC 28234
(704) 372-2140

BENJAMIN COTTEN
COTTEN & SELFON
1899 L Street, N.W., #1200
Washington, DC 20036
(202) 659-9505

MICHAEL E. QUIAT
Counsel of Record
USCHER, QUIAT, USCHER & RUSSO
401 Hackensack Avenue
Hackensack, NJ 07601
(201) 342-7100

LAMAR GUDGER
GUDGER, GUDGER & BAILEY
One Oak Plaza, Suite 306
Asheville, NC 28801
(828) 252-2227

Attorneys for Respondents

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STATEMENT OF THE CASE

The purported "questions presented" by Petitioners materially misstate the facts and circumstances surrounding this litigation. First, the District Court's charge to the jury concerning the nature of the inducement to the Plaintiff Lifetime Partners was fully consistent with and required by this Court's prior securities law decisions in *Forman* and *Howey*, and by multiple applications of those decisions by lower courts. More importantly, the charge itself was a logical and necessary application of all the principles enunciated by this Court in previous securities law opinions. The District Court did not add a "fourth element" to the *Howey* test, nor did the District Court's charge conflict with *United Benefit Life* which is wholly inapposite to this case. Moreover, there is no "split" in the circuits on this issue, as the language used by the District Court was mandated by the Supreme Court's prior opinions on these issues in *Howey* and *Forman*.

Similarly, the Petitioners' argument with respect to the risk capital test also distorts the record as to the handling of this issue by the District Court, and is simply a creation out of whole cloth. In fact, the risk capital charge provided to the jury by the District Court ***was itself drafted by the Petitioners***, and expressly consented to by Petitioners. The charge itself was vigorously objected to by Defendant-Respondents, and the Court ordered the charge included over defense objections. As a review of the charge reflects, the risk capital charge clearly ***excluded*** the "primarily for profit" requirement objected to by Petitioners with respect to the *Howey* test. The jury was instructed ***independently and separately*** on the risk capital test, with language ***written by Petitioners***, which language clearly ***excluded*** any requirement that the jury find that the inducement to purchase the LTPs was "primarily for profit". In short, Petitioners' argument with respect to the risk capital test is

belied by the clear facts established in the record of this proceeding. Petitioners have no justiciable issue with respect to the risk capital test.

Finally, with respect to the invocation of the Fifth Amendment by Defendant Bakker in response to deposition inquiry prior to the 1996 re-trial, Petitioners conveniently fail to inform the Court that there are ***no*** statute of limitations in the states of North Carolina or South Carolina for securities fraud, which are felonies under the criminal code in both those States. Bakker's invocation of his Fifth Amendment rights against this backdrop, given the fact that Bakker has ***not*** been immunized by either State or Federal authorities, is as basic and fundamental an application of the Fifth Amendment as could be imagined. Moreover, there is no "split" in the circuits with respect to the application of the Fifth Amendment privilege on these facts. The purported split which is suggested by Petitioners is premised upon facts which do not exist in this case, and which are clearly distinguishable from this case.

PROCEDURAL AND FACTUAL HISTORY

The facts surrounding the PTL Lifetime Partnership program and the fall of televangelist Jim Bakker have been amply documented in numerous appellate decisions over the course of the past decade. *See, e.g., United States v. Bakker*, 925 F.2d 728 (4th Cir. 1991); *Benton v. Bakker*, 92 B.R. 1000 (1988), *aff'd*, 944 F.2d 901 (4th Cir. 1991); *Teague v. Bakker*, 35 F.3d 978 (4th Cir. 1994), *cert. denied*, 513 U.S. 1153 (1995) (hereinafter "*Teague I*"). Mr. Bakker was previously convicted of mail and wire fraud, and spent almost five years in prison for these offenses. In the civil case, he was found liable for common law fraud as a result of the oversales of LTPs in various hotel projects at the PTL ministry.

In 1990, at the time of the first civil trial of this class action, Plaintiff/Petitioners argued successfully that Bakker's conduct constituted a massive fraud which resulted in over $129 million in damages to the Plaintiffs. 35 F.3d 978, 995. That fraud judgment was affirmed, as was Bakker's earlier criminal fraud conviction, *United States v. Bakker*, 925 F.2d 728 (4th Cir. 1991). In the appeal of the civil fraud verdict, the Fourth Circuit Court of Appeals remanded for trial of securities fraud claims against Bakker which had been dismissed by the District Court at the close of the original civil trial in December of 1990.[1] 35 F.3d 978, 990-91, 997.

TEAGUE I

In *Teague I*, the Fourth Circuit determined that ***only*** where the inducement to participate in an investment is ***exclusively*** for profit, or ***exclusively*** for personal consumption, can the District Court properly decide ***as a matter of law*** the question of whether an offering constitutes a security. 35 F.3d 988. *United Housing Foundation, Inc. v. Forman*, 421 U.S. 837 (1975); *S.E.C. v. W.J. Howey Co.*, 328 U.S. 293 (1946).

Teague I also held that where there is evidence to support ***both*** a financial motive ***and*** a personal use motive, the question of whether a particular product constitutes a security cannot

1. Amazingly, after nearly three months of trial in 1990, and a nearly 4-year appeal to the Fourth Circuit, Petitioners at the second trial in 1996, unilaterally abandoned their $129 million fraud judgment against Bakker (which had been upheld on appeal) ***for no consideration***, and argued that Bakker was really only ***negligent*** in his conduct. Petitioners' strategy was clear: they hoped to obtain a verdict at the second trial which was inconsistent with the prior fraud verdict, in order to bootstrap an argument that they were entitled to Director's and Officer's liability insurance coverage for Bakker's fraud. The District Court permitted this blatant gamesmanship, over defense objections. (A.159, 163).

be determined ***as a matter of law*** by the Court, and must instead be a matter determined by a jury after trial. 35 F.3d 978, 989.

It is thus clear from *Teague I* that the jury would be asked to look at all of the evidence of different inducements offered to the Lifetime Partners, to determine what was the ***primary, controlling or dominant*** inducement. Acknowledging that the individual motivations of the Lifetime Partners themselves confirmed their desire to obtain personal use by virtue of their participation in the LTP, *Teague I* nevertheless held that in the face of competing evidence suggesting a financial inducement, the issue of whether the LTPs were securities could not properly be determined by the Court ***as a matter of law***, and required a jury's determination. 35 F.3d 989, 990.

Thus, at the second trial in 1996, each side set about the task of showing the jury all evidence which each could muster to support their theory of what the ***primary*** inducement to the Lifetime Partners had been in connection with this LTP program.

Plaintiff-Petitioners relied on the same evidence offered at the previous trial in 1990, selectively isolating certain words and phrases from the voluminous brochures and mailings which had emanated from PTL. Specifically, Plaintiff-Petitioners highlighted the use of the terms "investment" and "appreciation" and repeatedly cited Bakker's enthusiastic promotional efforts on television. (Tr. 173-177). Significantly, there was ***no*** evidence offered to suggest that the partners expected anything more than savings on hotel accommodations in the future as a result of their personal use of the facilities. No partner testified about an expectation or the right to participate in earnings. No partner testified that he/she had ever attempted to sell his/her partnership for a profit, and no partner testified that he/she was aware of the sale of a partnership for profit, or otherwise.

The defense pointed out that words in the PTL literature like "investment" and "appreciation", which had been repeatedly emphasized by Plaintiffs, were but a very small part of the overall presentation which induced people to participate in the LTP program. As a review of the brochures themselves indicate, (A. 431-439, 521-547), the inducement to these partners, in substantial part, had virtually nothing to do with financial considerations. These Plaintiffs, most of whom were regular viewers of the Jim Bakker cable television program, were attracted by PTL's promise of a unique Christian environment, where those who wished to participate with other Christians in a special wholesome, Christian environment could come with their families and instill in them the values which these people were interested in living by and promoting. (A. 431-439, 521-547).

PTL was enthusiastically described as a Christian oasis and a spectacular Christian theme park which offered extraordinary amenities which could only be enjoyed by ***using*** the facilities at PTL with one's family. (Tr. 270-71, 782-83). The jury concluded that despite words like "investment" and "appreciation", these brochures, read in their entirety, proved that the allure to would-be purchasers was wholly unrelated to profit. (A.431-39, 521-47).

The defense also introduced video taped evidence which had not been seen in the prior trial. These videotapes were shown to the jury at the close of the defense case and completely gutted any suggestion that Bakker had ever represented to the partners that the LTPs could be sold, willed, inherited, or in any way converted for profit, thus disproving Plaintiff-Petitioners' theories of capital appreciation. (Tr. 1280-1305).

Though certain partners testified that they thought the partnerships might be "transferable", Plaintiff-Petitioners

adduced no evidence to show that the LTPs could be sold to a third party. In fact, the best Plaintiff-Petitioners could offer was a feeble attempt to demonstrate "transferability" by virtue of PTL's permitting partners to allow others to use their hotel facility in their place for a single yearly stay. (A. 610-611). Not a single partner testified that he believed that this right to permit others to use their facilities on an annual basis was the same as the ability to sell for a profit; indeed, a casual reading of these forms would have revealed no such right. (A. 610-611).

The evidence showed that out of more than 160,000 LTPs sold by Bakker, ***not one partner*** ever attempted to resell their LTP to a third party — this despite the overwhelming evidence submitted that partners were extremely dissatisfied with the LTPs almost from the moment they had sent in their money. (Tr. 816).

Plaintiff-Petitioners attempted to discount this compelling evidence by seeking to convince the District Court that evidence of the actual motivations of the partners themselves was not relevant. (Tr. 200-202; 1333-1335). The District Court properly rejected this argument, finding that the actual motivations of the purchasers, while not dispositive in the face of conflicting evidence of financial inducements, was still relevant to the jury in making its ultimate determination as to what was the ***controlling*** inducement. (Tr. 202; 1335).

The defense case brought to the Court's attention new evidence which had never been seen before at the first trial. First, Defendant-Respondents offered, over Plaintiffs' vigorous objection, 192 questionnaires prepared by the Federal Bureau of Investigation and Postal Inspectors reflecting information obtained from Lifetime Partners during the course of the criminal investigation which resulted in Bakker's indictment

in 1989. (Tr. 1086-1095). These questionnaires, were answered by the partners who were most disgruntled with Jim Bakker and the LTP Program; they reflected the contemporaneous thoughts and expectations of the purchasers of these LTPs, which preceded both Bakker's indictment and the first trial of this lawsuit. (Tr. 1085).

All Lifetime Partners who answered these questionnaires confirmed that their reasons for buying the LTP was to enjoy the PTL ministry and to ***use*** the partnership once a year with their family. ***Not one partner ever indicated an intent to purchase the LTP in order to make a profit.***[2]

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2. Moreover, the partners who actually testified at trial, also confirmed these inducements to purchase. For example, Plaintiff Annette Watson testified:

> Q: When you bought the partnership, you weren't buying it so that you could sell it to someone else for a profit, right?
>
> A: No, not with this type of thing, no. (Tr. 440).

Rita Strahowski, also a name Plaintiff, confirmed her intentions:

> Q: You didn't intend to sell it at the time you purchased it?
>
> A: No, I certainly didn't.
>
> * * *
>
> Q: Alright. So it was not something that you intended 10 or 15 years down the road to sell like stock or bonds or something like that, to make a profit, was it?
>
> A: No, I bought it strictly for the benefit of my family to have a vacation place to go. (Tr. 568).

Name Plaintiff Swanee Beck also conceded:

> Q: Did you intend to sell it?

(Cont'd)

(Cont'd)

A: No. I didn't intend to sell it at that time. I intended to use it. (Tr. 882).

Q: So as I understand it, you bought these partnerships to use these partnerships, correct?

A: Yes.

Q: And if you didn't use them, there would have been no real purpose in buying them, correct?

A: That's right, because they had no value to me had I not.

Q: If you didn't use them?

A: Right. (Tr. 785).

Name Plaintiff Brenda Levy:

Q: Did you ever have any intent to sell your Lifetime Partnership?

A: No, indeed. I saw it as a place where my family could come from various areas of the United States, and that by having enough partnerships, I would have time so everybody could come and we could have a holiday together once a year. (Tr. 976).

Finally, Plaintiff Barbara Schmidt:

Q: And if you didn't go to the PTL and you didn't stay at the bunkhouse, the partnership was worth nothing, correct?

A: That's correct.

Q: And let me ask you this: Did you ever have any expectation of getting anything more than the week of staying at the bunkhouse once a year for the rest of your life?

A: No, sir. That was the expectation I had, that my family could — my husband and myself and my children can go once a year for vacation. (Tr. 1190-1200).

Defendant-Respondents offered testimony from individuals who were clearly in a position to know whether anyone had ever sought to sell these LTPs. Testimony was adduced from representatives of the biggest newspaper in North Carolina, the Charlotte Observer, from a prominent local stockbroker and from an auctioneer, all of whom were familiar with the LTP Program, but none of whom had ever heard of anyone selling or attempting to sell their LTP. (Tr. 1065, 1244, 1259).

This was the case that went to the jury on July 22, 1996 for determination. The defense argued one issue only: the LTPs were not securities. The defense conceded that the partners had been defrauded by virtue of the oversales of the partnerships which had made it impossible for partners to gain access to and use the facilities as they had hoped. It was left to the jury to determine whether the various inducements demonstrated by the evidence presented were such as to make the LTPs securities, or if not, whether the LTPs were securities under the alternative "risk capital" test.[3]

When the jury returned after two hours of deliberations, they answered the sole issue posed by the defense — LTPs were ***not*** securities under ***either*** test.

TEAGUE II

Following the second civil jury verdict in 1996, Petitioners sought relief on appeal once again to the United States Court of Appeals for the Fourth Circuit. Petitioners argued, *inter alia*,

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3. Plaintiff-Petitioners had obtained at the second trial in 1996, over defense objections, an alternative charge by which the jury could find a security under the "Risk Capital" test. This charge was drafted by Plaintiff-Petitioners, and specifically ***excluded*** any requirement that the jury make any determination as to the primary inducement.

that the District Court's charge with respect to the primary inducement to the purchasers was contrary to the law as required by this Court in *Forman* and *Howey*.[4] Essentially, the Fourth Circuit in *Teague II* rejected the Petitioners' arguments because they confused the standards applicable to decisions made by the trial courts ***as a matter of law***, and those decisions properly left for a jury. (Slip Opinion at p. 6). *Teague II* recognized that where the facts of a case indicate that a transaction is ***solely*** for the personal use or consumption of the purchaser, the court is empowered to determine as a ***matter of law*** that such products do not constitute securities. *Teague II* recognized that on the other side of the spectrum, the Supreme Court had held in *Howey* that transactions which induced purchasers to participate ***solely*** for profit are securities ***as a matter of law***. But *Teague I* had identified ***both*** possible inducements, where ***both*** personal use ***and*** the potential for profit may have been evident in the record. Consequently, as the Fourth Circuit held in *Teague I*, it was a jury determination.

The District Court's charge to the jury in the second trial that "[i]f the investors were attracted primarily by the prospect of acquiring use and not by financial returns on investment, there is no security" was recognized by the Fourth Circuit in *Teague II* as a commonsense application of the long established principles of securities law enunciated by this Court in *Howey* and *Forman*. *Teague II* thus held that "the jury charge adequately conveyed to the jury that it was to determine whether consumption or investment was ***the dominant*** theme of the transaction". (Emphasis added). (Slip Opinion at p. 6).

Finally, with respect to Bakker's invocation of his Fifth Amendment rights at pre-trial depositions in 1996, the only other

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4. No argument was made by Petitioners at either the District Court or Court of Appeals level that this charge was contrary to the requirements of *SEC v. United Benefit Life*, 387 U.S. 202 (1967). This allegation surfaced for the very first time in the current petition for certiorari.

issue which the Fourth Circuit deemed worthy of comment in *Teague II*, the Court upheld the obvious propriety of Bakker's reliance on the Fifth Amendment where, as here, he had ***not*** been immunized on a state or federal level for securities fraud (or any other crimes), and there is ***no*** statute of limitations for securities fraud in North Carolina or South Carolina, where the complained-of acts occurred. Given these facts, the Court in *Teague II* properly concluded that "Bakker would have taken a palpable risk had he testified." (Slip Opinion at p. 6). As the Court explained:

> It may well be that there is little current likelihood of prosecution; on the other hand, the unlikeliness is the result of prosecutorial discretion, and new information could always re-ignite interest. ***Bakker has the right to refuse to provide the kindling***.

(Emphasis added). (Slip Opinion at p.6).

REASONS FOR DENYING THE WRIT

I. PETITIONERS IMPROPERLY SEEK TO IMPOSE A DIRECTED VERDICT/SUMMARY JUDGMENT STANDARD UPON THE DELIBERATIONS OF THE JURY.

The entire premise of Petitioners' argument as to the jury charge in *Teague II* is faulty. It confuses the standard applicable to determinations by the Court ***as a matter of law***, with the standard applicable to jury determinations in the face of conflicting evidence. The charge which the Court ultimately gave to this jury properly reflected the process which the jury ***had*** to undertake in order to reach a proper determination as to whether LTPs constituted securities. If, as Petitioners now urge, the proper standard to exclude securities coverage in the face of competing evidence is whether the ***sole*** inducement

was personal consumption, then the Fourth Circuit would have directed a verdict in favor of Plaintiffs in *Teague I*, since it was clear that personal consumption was not the ***sole*** inducement. 35 F.3d 978, 989. Indeed, that is precisely why a jury trial was required on securities law violations.

A. The jury charge was consistent with *Forman* and *Howey*.

The test for whether a product constitutes an investment contract and hence a security was enunciated by the Supreme Court in *S.E.C. v. W.J. Howey & Co.*, 328 U.S. 293 (1946). In *Howey*, the question before the Court was whether the sale of orange groves in interstate commerce, to be managed and harvested on an aggregate basis for profit, constituted a securities offering which was required to be registered with the S.E.C. 328 U.S. 293, 297. The District Court in *Howey* had ruled ***as a matter of law*** that orange groves sold by contract were not securities. 328 U.S. 293, 294. The Fifth Circuit affirmed, and the Supreme Court granted *certiorari* on whether the sale of these orange groves constituted investment contracts covered by the securities laws. 328 U.S. 293, 294.

The *Howey* Court reversed and held ***as a matter of law*** that these transactions were investment contracts covered by the securities laws. 328 U.S. 293, 300. The Court explained:

> The transactions in this case clearly involve investment contracts as so defined.
>
> * * *
>
> [The Purchasers] reside in distant localities and . . . lack the equipment and experience requisite to the cultivation, harvesting and marketing of the citrus products. Such persons have no desire to occupy

> the land or to develop it themselves; they are attracted ***solely*** by the prospects of a return on their investment.

328 U.S. 293, at 299-300. (Emphasis added).

Because the investors "are attracted ***solely*** by the prospects of a return on their investment", the *Howey* Court ruled ***as a matter of law*** that the securities laws apply. 328 U.S. 293, 301.[5] (Emphasis added).

In *United Housing Foundation, Inc. v. Forman*, 421 U.S. 837 (1975), the Court was faced again with a situation where a lower court had ruled as a matter of law, but in this instance, the Court had ruled that the transaction was a security covered by the securities laws. 421 U.S. 837, 846. *Forman* involved the sale of shares in a public housing project known as "Co-op City" in New York City. 421 U.S. 837. Purchasers received stock in a non-profit corporation which entitled them to reside in below market rate leased apartments. When cost overruns forced the actual rental charges to be higher than those originally projected, a class action suit was commenced alleging, *inter alia*, violation of the Federal securities laws. 421 U.S. 837, 844.

The District Court dismissed the Complaint, ruling that the Co-op shares were not securities. The Second Circuit reversed, holding that these shares were securities ***as a matter of law***. 421 U.S. 837, 846. On *certiorari*, the Supreme Court reversed, holding that the shares in the cooperative were not securities ***as a matter of law***. 421 U.S. 837, 858.

Initially, Justice Powell, writing for the Court in *Forman*, rejected the notion that the word "stock" was of any particular significance in determining whether a security existed, reasoning

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5. This assumes of course, that the first two prongs of the *Howey* test have been met, as was conceded in the case at bar. (A.39).

that mere words alone cannot obscure the reality of the transaction. 421 U.S. at 851.

Moreover, the Court also concluded that despite the obvious inducement to purchasers to obtain below market rates on decent housing, such an inducement did ***not*** constitute a profit motivation that would make the transaction subject to the Federal securities laws:

> The Court of Appeals . . . found support for the concept of profits in the fact that Co-op City offered space at a cost substantially below the going rental charges for comparable housing. ***Again, this is an inappropriate theory of "profits" that we cannot accept . . . This benefit cannot be liquidated into cash.***

(Emphasis added). 421 U.S. 855.

* * *

> There is no doubt that purchasers in this housing cooperative sought to obtain a decent home at an attractive price. But that type of economic interest characterizes every form of commercial dealing. What distinguishes a security transaction - and what is absent here — is an investment where one parts with his money in the hope of receiving profits from the efforts of others, and not where he purchases a commodity for personal consumption or living quarters for personal use.

421 U.S. 837, 858.

As a result, the Court in *Forman* upheld a determination ***as a matter of law*** that the shares in Co-op City were not securities subject to Federal securities regulation. 421 U.S. 837, 858-859.

In *Teague I*, the Court addressed a similar question based upon the District Court's determination ***as a matter of law*** that the LTPs were not securities. 35 F.3d 978, 985-86. The District Court had ruled that since all the Plaintiffs had testified that they intended to personally use and consume the LTPs, and not to sell them for profit, then the securities laws do not apply as a matter of law. (A. 119; 35 F.3d 978, 985). On appeal, the Fourth Circuit in *Teague I* reversed, determining that since there was evidence in the record to suggest other inducements in addition to the desire to personally consume the item purchased, the Court could ***not*** decide the issue ***as a matter of law***. 35 F.3d 978, 987. The Court explained that evidence of the purchasers' actual motivations, while relevant, could not be determinative where "the promoter of the scheme in question marketed the scheme by emphasizing the potential for profit." 35 F.3d 978, 988.

In acknowledging the differing inducements suggested by the evidence at trial, *Teague I* concluded that a determination as to whether the LTPs are securities could ***not*** be made by the District Court, but was instead a matter to be decided by the jury at a new trial. 35 F.3d 978, 990.

Thus, *Howey* and *Forman* both hold that a determination as to whether a product constitutes a security can be made ***as a matter of law*** by the Court without a jury ***only*** where the Court can determine from the evidence that the ***sole*** inducement was either to obtain use for personal consumption (no security under *Forman*), or where the ***sole*** inducement was to obtain a return on investment (security under *Howey*). Where the record

suggests two possible inducements which might support either theory, *Teague I* properly determined that the question could not be decided ***as a matter of law*** by the District Court, and sent the matter back for retrial by a jury to determine the ***primary*** inducement.

Hence, the "solely" language of *Forman* and *Howey* simply did not and could not apply on the *Teague II* facts. Where there was conflicting evidence which demonstrated more than one inducement to purchase the LTPs, it was incumbent upon the jury to determine which inducement was ***primary***.[6]

Teague II properly held that the "primary inducement" concept is required by *Forman*, as the author of *Forman* himself acknowledged. (*See* Slip Opinion at p.5). *Teague II* expressly relied upon *Rice v. Braniger Organization, Inc.*, 922 F.2d 788 (11th Cir. 1991), an opinion written by retired Justice Powell who 16 years earlier had written the Supreme Court's opinion in *Forman*. (Slip Op. at p.5). *Rice* specifically endorsed the "primarily for use" analysis when faced with mixed inducements:

> We believe that people buy houses and lots in a beach-club development ***primarily*** to use them, not to derive profits from the entrepreneurial efforts of the developers.

(Emphasis added). 922 F.2d 788, 790-91.

Teague II also recognized similar support for this language in *Aldrich v. McCulloch Properties, Inc.*, 627 F.2d 1036 (10th

6. Petitioners essentially conceded this concept at trial, at one point proposing that the court charge the jury that they must find that purchasers were induced "in substantial part" by profit motivation, in order to find a security. Petitioners later withdrew this proposal, lamely asserting that they had been "mistaken". (Tr. 1308, 1412, 1433).

Cir. 1980). ("[C]learly the lots are not securities if the purchasers were induced to obtain them ***primarily*** for residential purposes — to occupy the land or develop it themselves".)

B. There was no "fourth" element added to the *Howey* test.

Petitioners' assertion that the District Court had grafted on to the *Howey* test a purported "fourth element" by utilizing the terminology that the jury must find the primary or dominant inducement of the transaction, completely misconstrues the facts. The Court properly charged the three (3) elements required by the *Howey* test: (1) an investment of money; (2) in a common scheme or enterprise; (3) with the expectation of profits garnered most essentially from the efforts of others. *See SEC v. W. J. Howey Co.*, 328 U.S. at 300, 66 S. Ct. at 1103; *United Housing Foundation, Inc. v. Forman*, 421 U.S. at 853, 95 S. Ct. at 2060.

The issue in *Teague II* was the precise method for charging the jury on the "expectation of profit" element when the profit inducement is not the only inducement evident in the record. *Teague I* at 989-990. *Teague II* (Slip Op. at p.5). The Court properly gave the same three-part test mandated by *Howey*, with a necessary explanation about the profit expectation requirement as interpreted by *Forman*. There was no fourth element added to the *Howey* test.

C. There is no split in the circuits as to the requirements of *Howey* and *Forman*.

Petitioners' attempt to attract this Court's interest by suggesting the existence of a split in the circuits over the propriety of the District Court's charge on the *Howey* test is a red herring. There is no split in the circuits.

Petitioners' purported reliance on allegedly conflicting decisions from the Sixth, Ninth and Second Circuits is unavailing. *Newmyer v. Philatelic Leasing, Ltd.*, 888 F.2d 385 (6th Cir. 1989), *cert. denied*, 495 U.S. 930 (1990), is not in conflict with *Teague II*. *Newmyer* involved the sale of tax shelters in the form of leased investments in certain postage stamps. Simply stated, *Newmyer* stands for the exact same proposition as *Teague I* which held that in cases of mixed inducements (*i.e.*, profit and/or personal use), the question of whether a product constitutes a security is a question of fact to be determined by the jury. 888 F.2d 394. Recognizing that the Plaintiffs were "not motivated by a quixotic desire to paste hundreds of thousands of identical stamps in their own album", the Court explained:

> Although the Plaintiffs in the case at bar were attracted in part by the expectation of substantial tax advantages, it is certainly open to them to try to prove they had a profit motive too.

888 F.2d 392.

In short, *Newmyer* simply confirms that a jury must determine the reach of the securities laws in cases of mixed inducements. Hence, there is no split between *Teague II* and the Sixth Circuit.

Similarly, Petitioners' claim that the Ninth Circuit law is contrary to the holding in *Teague II* is also inaccurate. *SEC v. Goldfield Deep Mines Company of Nevada*, 758 F.2d 459 (9th Cir. 1985). *Goldfield* also involved tax shelters, but was a challenge of a jury verdict finding that the securities laws ***did*** apply to the product there at issue. *Goldfield* also involved mixed inducements wherein the defense had argued that since the focus of the inducement to purchasers were tax benefits

which did ***not*** constitute an expectation of profit, 758 F.2d 464, sale of such tax shelters did not constitute the sale of unregistered securities. The jury disagreed, and found a violation of the securities laws. The Ninth Circuit affirmed, explaining that the prospect of tax benefits resulting from initial losses did not necessarily rule out an expectation of profit separate and distinct from this benefit. Citing the aggressive sales literature which promised profits on their investment, the Court explained that the jury could have found on the evidence that an expectation of profit, independent of anticipated initial tax benefits, was the inducement to prospective investors, thereby distinguishing it from the holding of *Forman*. 758 F.2d 464 at n.2. There is no conflict between *Teague II* and the Ninth Circuit.

Petitioners' claim of a conflict with the Second Circuit by reliance on *SEC v. Aqua-Sonic Products Corp.*, 687 F.2d 577 (2nd Cir.), *cert. denied*, 459 U.S. 1086 (1982), is also misplaced. In *Aqua-Sonic*, the issue before the Second Circuit was ***not*** whether the Plaintiffs had an expectation of profits, an element which was expressly conceded by the promoters in that case. 687 F.2d at 581. Rather, the issue in *Aqua-Sonic* was whether those profits were properly determined to be derived "solely" from the efforts of others. 687 F.2d at 582. Hence, *Aqua-Sonic* has no precedential value on the issue now before the Court, and does not reflect any conflict between *Teague II* and the Second Circuit.

In fact, the Second Circuit is in complete agreement with *Teague II*, *Forman* and *Howey*. *Grenader v. Spitz*, 537 F.2d 612 (2nd Cir. 1976). *Grenader* involved a set of facts similar to those in *Forman*. The issue was whether Defendants' offer to sell a co-op apartment embodied a profit inducement, or simply the inducement to personally use the apartment as in *Forman*. The Court held, consistent with *Forman*, that the purchasers

of the co-op apartments desired to personally occupy the apartments and were not led to expect profits such as to bring the transaction within the purview of the securities laws. 537 F.2d 619.

D. This Court's decision in *United Benefit Life* is totally irrelevant to the issues now before the Court.

Petitioners' attempt to suggest that *Teague II* is in conflict with *SEC v. United Benefit Life*, 387 U.S. 202 (1967) should be rejected as frivolous. *SEC v. United Benefit Life*, 387 U.S. 202 (1967) has virtually no applicability to the case now before the Court. Nor did Petitioners ever previously allege such a conflict at either the District Court or Court of Appeals level.

United Benefit determined whether a product was exempt from the registration requirements of the securities acts under the terms of the insurance contract exemption of the acts. In evaluating the specific facts in *United Benefit*, the Court concluded that in fact the promoters were offering two distinct products, one which could properly be characterized as insurance (the variable annuity), and one which was properly within the purview of the securities act ("the flexible fund"). In this sense, Petitioners' characterization of *United Benefit* as this Court's "one decision on mixed usage–investment" is a blatant mischaracterization of the decision. In any event, *United Benefit Life* has no applicability to the issues now before the Court.

Indeed, the Fourth Circuit in *Teague II* cited to another Supreme Court decision which did deal with an analogous circumstance to that now before the Court, *International Brotherhood of Teamsters v. Daniel*, 439 U.S. 551 (1979), but Petitioners fail to even acknowledge its existence. In *Daniel*, specifically cited in *Teague II* (see Slip. Op. at p.5, n.2), the

Supreme Court held that an employee's interest in a non-contributory, compulsory pension plan is not a security, explaining that the "employee is selling his labor ***primarily*** to obtain a livelihood, not making an investment". (Emphasis added). 439 U.S. at 560. Hence this Court has acknowledged in an analogous situation that in cases involving mixed inducements, it must be determined which inducement was ***primary*** in order to find whether such case falls within the scope of the securities acts.

Nor does *Teague II* conflict with *SEC v. C.M. Joiner Leasing Corp.*, 320 U.S. 344 (1943). In *Joiner*, the SEC had sought to enjoin the sale of leasehold interests in oil wells. After trial, the District Court denied the injunction finding that the oil leases were not securities. The Fifth Circuit affirmed the opinion and the Supreme Court granted *certiorari* and reversed the findings of the lower courts. ("It is clear that an economic interest in this well drilling undertaking was what brought into being the instruments that defendants were selling and gave to the instruments most of their value and ***all*** of their lure") (Emphasis added) 320 U.S. at 349. Here again, Petitioners' assertion of a conflict does not withstand even the most cursory examination.

E. The floodgates have not been opened, Petitioners' shrill protestations to the contrary notwithstanding.

To read Petitioners' argument, one might think that the *Teague II* decision was such a bizarre and reckless departure from the law of securities as developed by this Court in the 55 years since *Joiner*, that hordes of unscrupulous promoters will now jump into the market and exploit this legal aberration to the great and substantial detriment of the investing public, as well as the timeshare resort industry. Of course, nothing could be further from the truth.

First, the reach of the securities laws is largely determined on a case by case analysis, which analysis must always be highly fact sensitive and consistent with the congressional intent which underlies the statutes. *See, e.g., Marine Bank v. Weaver*, 455 U.S. 551, 556 (1982) ("Congress, in enacting the securities laws, did not intend to provide a broad federal remedy for all fraud.") The facts of *Teague I and II* are unique and will not easily be applied to other cases.

Moreover, the "primarily for use or profit" concept has long preceded the *Teague II* opinion. *See, e.g., Grenader v. Spitz*, 537 F.2d 612 (2d Cir. 1976); *Aldrich v. McCulloch*, 627 F.2d 1036 (10th Cir. 1980); *Rice v. Branigar Organization, Inc.*, 922 F.2d 788 (11th Cir. 1991). Petitioners' overstated and unduly dramatic assertions about the impact of *Teague II* on the time share and resort condominium industries is thus unpersuasive. *Teague II* simply applies black letter law which has evolved over the course of the past 55 years. There is nothing "new" or particularly significant about the legal standards enunciated in *Teague II*. Once again, Petitioners' attempts to catch the attention of this Court by grossly overstating its case, must necessarily fail on the merits. In sum, Petitioners "doth protest too much."

The charge to the jury was in all respects appropriate given the evidence of more than one inducement to purchase the LTPs. It was a jury question as to which inducement actually prompted the purchase even though there may have been more than one inducement present. Thus, it was necessary for the jury to determine which inducement was primary. This could only be determined by a jury after a full trial, as it was properly in this case.

II. PETITIONERS HAVE NO JUSTICIABLE ISSUE WITH RESPECT TO THE RISK CAPITAL TEST.

Because Petitioners received everything they asked for from the District Court with respect to the risk capital test (and still lost), they have no remaining justiciable issue which this Court could properly address concerning risk capital. *See, e.g., Flast v. Cohen*, 392 U.S. 83 (1968); *Warth v. Seldin*, 422 U.S. 490 (1975); *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26 (1976). The risk capital test was charged to this jury as a distinct alternative to the investment contract *Howey* test, over the vigorous objections of the Respondent Bakker. (Tr. 1319). Petitioners acknowledged that the risk capital test had never been adopted in the Fourth Circuit, yet nevertheless argued (successfully) that it was appropriate in this case. (Tr. 1323). The charge to the jury about risk capital was separate and apart from the charge on the *Howey* test. (Tr. 1543). Thus, Petitioners' objections to the charge given under the *Howey* test have no relevance to the risk capital charge which expressly did ***not*** include the "primarily" language objected to by Petitioners. (Tr. 1543). In fact, the charge on risk capital was written and consented to by the Petitioners. (Tr. 1319-1329). The jury simply decided against them — hardly creating a justiciable issue for this high Court.

It is still Respondent Bakker's position that the risk capital test charge should not have been given at all. The risk capital test might have arguably applied had the Petitioners chosen not to abandon their State securities claims, since risk capital appears now to be part of the administrative code in North Carolina. 18 N.C. Adm. Code § 1104(n)(2). But nowhere is there any indication that the risk capital test applies to Federal § 12(2) claims, nor do Petitioners offer any reason why it should. In any event, Petitioners got the risk capital charge which they demanded, over objection. Hence, even if this Court

agreed with Petitioners that the risk capital test should apply to alleged federal securities law violations, the result in this case would remain the same. The jury found against Petitioners on the merits — not because of any legal error in the proceedings. Petitioners therefore have no issue left about which to complain.

III. PETITIONERS' ARGUMENTS WITH RESPECT TO BAKKER'S FIFTH AMENDMENT PRIVILEGE ARE WITHOUT MERIT.

A. Bakker is without immunity for state felony securities violations which have no statute of limitations.

Petitioners' assertion that Bakker waived his Fifth Amendment privilege by testifying in other proceedings is directly contrary to the law. *See, e.g., Pillsbury Co. v. Conboy*, 459 U.S. 248 (1983); *United States v. Cain*, 544 F.2d 1113 (1st Cir. 1976); *United States v. Lawrensen*, 315 F.2d 612 (4th Cir. 1963); *United States v. Miranti*, 253 F.2d 135 (2d Cir. 1958); *In re Neff*, 206 F.2d 149 (3rd Cir. 1953); *In re Morganroth*, 718 F.2d 161 (6th Cir. 1983); *In re Corrugated Container Antitrust Litigation*, 661 F.2d 1145 (7th Cir. 1981) (en banc); *Jeffries v. United States*, 215 F.2d 225, 226 (9th Cir. 1954). Similarly, Petitioners' claim that Bakker no longer faced a risk of incrimination by virtue of any testimony he might give in this trial is again contrary to clear law in North Carolina and South Carolina, where there are ***no*** statutes of limitation for the felony of securities fraud, and where Bakker has not been immunized by either State or Federal authorities. *State v. Johnson*, 275 N.C. 264, 167 S.E. 2d 274 (1969); *State v. Burnett*, 184 N.C. 783, 115 S.E. 57 (1922).[7]

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7. Petitioners' farfetched argument that further prosecution of Bakker could violate the "speedy trial" provisions of the Sixth (Cont'd)

Respondent Bakker never argued that prior testimony which he gave in other legal proceedings could not be admitted against him in this civil trial. However, it is precisely because Bakker did ***not*** previously testify in the substantive areas where Petitioners wished to depose him, that use of his prior testimony was not sufficient for Petitioners' purposes. Hence, Petitioners' current argument that "Bakker testified voluntarily on the same issues at his criminal trial" (*see* Petition, at p. 27) is factually erroneous. If he had, the Petitioners would have had such prior testimony admitted into evidence. It is precisely because Bakker had ***not*** previously testified about these issues, that any claim of waiver must fail.

B. Bakker faced a real possibility of prosecution.

The argument by Petitioners that the risk of further prosecution to Bakker was too "remote and speculative" to justify invocation of his Fifth Amendment rights, is contrary to the facts, as articulated by the District Court, as well as the Fourth Circuit. The District Court specifically reviewed the questions asked by Petitioners, to which Bakker had invoked the Fifth Amendment, and concluded:

> It is evident both on the face of the questions, and reviewing them in this context, that they have incriminating potential. . . . These questions, ***clearly incriminatory***, are not limited to issues of negligence, as Plaintiffs claim.

(Emphasis added). (A. 196). On appeal, the Fourth Circuit agreed, finding that "Bakker would have taken a palpable risk had he testified . . ." (Slip. Op. at p. 6).

(Cont'd)
Amendment was properly rejected in *Teague II* (Slip Op. at p.7, n.3). Nor do Plaintiffs even have standing to raise the issue. *Washington Legal Foundation v. Massachusetts Bar Foundation*, 993 F.2d 962, 971 (1st Cir. 1993); *Harper v. Crocket*, 868 F. Supp. 1557, 1574 (E.D. Ark. 1994).

Moreover, as the District Court properly noted, "[o]nce incriminating potential is found to exist, courts should not engage in raw speculation as to whether the government will actually prosecute." (A.196). (Citing *United States v. Sharp*, 920 F.2d 1167, 1170 (4th Cir. 1990) (A. 196); *See also In re: Corrugated Container Antitrust Litigation*, 661 F.2d 1145, 1153 (7th Cir. 1981) ("Any doubt as to the likelihood of possible prosecution must be resolved in favor of the witness."); *United States v. Miranti*, 253 F.2d 135, 139 (2d Cir. 1958). (The validity of the privilege cannot be grounded on a court's assessment of the likelihood of prosecution, because predicting the behavior of prosecutorial authorities is not a reliable basis for assessing the risk of prosecution.)

In evaluating this issue, lower courts must also be mindful of this Court's long stated admonition to liberally construe the Fifth Amendment's protections. *Counselman v. Hitchcock*, 142 U.S. 547, 562 (1892) (Privilege must be broadly construed in favor of the right it was intended to secure); *Arndstein v. McCarthy*, 254 U.S. 71, 72-73 (1920) (Privilege must be accorded broad construction); *Hoffman v. United States*, 341 U.S. 479, 486 (1951) (Privilege must be accorded liberal construction); *Murphy v. Waterfront Commission*, 378 U.S. 52 (1964) (Fifth Amendment construed to protect a state witness under federal law.); *New Jersey v. Portash*, 440 U.S. 450, 453 (1979) (Fifth Amendment construed to prohibit use of immunized testimony on cross-examination.)[8]

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8. Petitioners also fail to address the District Court's finding that compelled testimony of Bakker could have been used against him in a possible perjury prosecution. (A. 196). *See, e.g., In re Morganroth*, 718 F.2d 161, 165 (6th Cir. 1983) ("When a witness is asked a question in a subsequent proceeding, the answer to which could show that he has already committed the crime of perjury in a prior proceeding, his refusal to answer is permissible almost by the definition of self-incrimination.") *See also Pillsbury Co. v. Conboy*, 459 U.S. 248, 255 (1983) at n.14.

C. There is no split in the circuits.

As a result of Petitioners' factual misstatements about Bakker's prior testimony, and Petitioners' failure to acknowledge either that there are no statutes of limitation for state securities fraud, or that Bakker had never been immunized, Petitioners' attempt to create a split in the circuits on this issue must be rejected. Petitioners' assertion that *Ellis v. United States*, 416 F.2d 791 (D.C. Cir. 1969) would lead to a contrary result in this case is simply inaccurate. In holding that the individual who sought to invoke his Fifth Amendment rights had previously waived his rights by testifying before the Grand Jury with knowledge of his privilege, the D.C. Circuit nevertheless explained:

> [T]he waiver carries through ***unless there is new material or possibly new conditions that may give rise to further incrimination***.
>
> * * *
>
> We repeat, for emphasis, that our holding does ***not*** apply when the witness is himself accused or under indictment. We also hold that the witness . . . may object to any questions that would require disclosure of ***new*** matters of substance.

(Emphasis added). *Ellis v. United States*, 416 F.2d at 805.[9]

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9. Moreover, even if *Ellis* is deemed inconsistent with *Teague II*, at least one Circuit Court has opined that *Ellis* may no longer be good law, in light of this Court's decision in *Pillsbury Co. v. Conboy*, 459 U.S. 248 (1983). *In re: Morganroth*, 718 F.2d 161, 165 (6th Cir. 1983) at n.1. *See also United States v. Johnson*, 488 F.2d 1206, 1209 (1st Cir. 1973) (*Ellis* holding "seriously questioned").

Given this clear qualification of its holding, there is no question that application of *Ellis* to the facts of the case now before the Court would result in the same ruling affirmed in *Teague II*. There can be no waiver with respect to substantive information not previously provided by the witness, and any waiver which did attach to prior testimony would not carry through to different legal proceedings, assuming the risk of incrimination is still evident. *See, e.g., Pillsbury Co. v. Conboy*, 459 U.S. 248, 262 (1982) (Witness entitled to invoke the Fifth Amendment in a subsequent civil proceeding, to the same questions which witness had previously answered in the grand jury under a grant of immunity.) *United States v. Licavoli*, 604 F.2d 613 (9th Cir. 1979) *cert. denied*, 446 U.S. 935 (1980); *United States v. Cain*, 544 F.2d 1113 (1st Cir. 1976); *United States v. Lawrensen*, 315 F.2d 612 (4th Cir. 1963); *United States v. Miranti*, 253 F.2d 135 (2d Cir. 1958).

Petitioners' purported reliance on *Walker v. Lockhart*, 763 F.2d 942 (8th Cir. 1985) is even further off the mark. Simply stated, *Lockhart* does not address the question of a waiver of Fifth Amendment privilege. Its inclusion in the Petition is therefore a mystery.

Nor are this Court's prior decisions in *Harrison v. United States*, 392 U.S. 219 (1968), and *Reina v. United States*, 364 U.S. 507 (1960) of any significance to the issue now before the Court. *Harrison* did not involve the question of a waiver with respect to the Fifth Amendment privilege. *Reina* is cited simply for *dicta* which on its face does not apply to the facts of this case.

Where, as here, an individual faces questioning in an area where criminal liability attaches, without any statute of limitation, and where, as here, the witness is a high profile white collar criminal defendant who has not been immunized for such conduct, black letter law mandates the propriety of the invocation of the Fifth Amendment by that witness. There is nothing in any case cited by the Petitioners which would warrant a different result on these facts.

cited by the Petitioners which would warrant a different result on these facts.

CONCLUSION

For all the reasons set forth herein, Respondents respectfully request that the Petition for Writ of Certiorari be denied in all respects.

Respectfully submitted,

MICHAEL E. QUIAT
Counsel of Record
USCHER, QUIAT, USCHER
& RUSSO
401 Hackensack Avenue
Hackensack, NJ 07601
(201) 342-7100

LAMAR GUDGER
GUDGER, GUDGER & BAILEY
One Oak Plaza, Suite 306
Asheville, NC 28801
(828) 252-2227

NELSON S. CASSTEVENS, JR.
CASSTEVENS, HANNER,
GUNTER & CONRAD
602 East Morehead Street
P.O. Box 34607
Charlotte, NC 28234
(704) 372-2140

BENJAMIN COTTEN
COTTEN & SELFON
1899 L Street, N.W., #1200
Washington, DC 20036
(202) 659-9505

Attorneys for Respondents